

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM C. WOBSCHELL,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
SP07528910359

DATE: FEB 16 1990

William C. Wobschall, San Bernardino, California, pro se.

Timothy C. Phillips, Norton Air Force Base, California,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued May 22, 1989, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we, therefore, DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DISMISS the appellant's appeal for lack of jurisdiction.

BACKGROUND

The agency removed the appellant from his position of Audiovisual Material Controller effective October 23, 1987. The appellant appealed his removal through the negotiated grievance procedure. During the course of his grievance, the appellant and the agency entered into a settlement agreement under which the appellant agreed to resign from his position in exchange for the agency's promise to effect various administrative matters regarding the appellant's resignation. The agreement also stated that it represented the complete understanding between the parties and that, by entering into it, the appellant and the agency waived and released any claims of any kind that related to, or grew out of, the appellant's removal. Finally, the agreement provided that enforcement for a breach of the agreement could be obtained by directly requesting arbitration in accordance with the procedures contained in the negotiated agreement.

After submitting his resignation in accordance with the terms of the settlement agreement, the appellant filed a petition for appeal with the Board's San Francisco Regional Office, alleging that his resignation was involuntary because the agency was not satisfying its obligations under the agreement. Following an opportunity for the parties to submit evidence and argument on the issue of the Board's jurisdiction over the appeal, the administrative judge dismissed the appeal for lack of jurisdiction finding that, under 5 U.S.C. § 7121(e)(1), the appellant had the option of choosing to

pursue his removal through either the Board or the negotiated procedure, but not both. Because the appellant elected the negotiated procedure, the administrative judge concluded that the appellant relinquished his rights to appeal this matter to the Board.

In his petition for review, the appellant asserts that his appeal of his involuntary resignation is distinct from his removal grievance, and is based solely on the agency's failure to honor the terms of the settlement agreement.

ANALYSIS

The Board lacks jurisdiction over the appellant's appeal.

At the outset, we note that the administrative judge correctly found that the appellant's petition for appeal is beyond the Board's jurisdiction to the extent it concerns his removal. The appellant had the option of choosing to pursue his removal with the Board or through the negotiated procedure, and, because he chose the negotiated procedure, he is precluded from pursuing an initial review of his removal with the Board. See *Morales v. Merit Systems Protection Board*, 823 F.2d 536, 538 (Fed. Cir. 1987).

We also note that the appellant's appeal can be interpreted as an attempt to seek compliance with the terms of the settlement agreement. The Board has authority to enforce the terms of a settlement agreement where the agreement has been accepted into the record of a Board appeal. See *Kinney v. Department of the Interior*, 30 M.S.P.R. 170, 171-72 (1986). In the present case, the settlement agreement was not reached

during the course of an appeal to the Board, and, therefore, was not made part of a Board record. Thus, we lack jurisdiction to enforce its terms.

Finally, to the extent that the appellant's appeal can be viewed as an appeal of an involuntary resignation, we find that we lack jurisdiction over it because the appellant has failed to establish that the agency obtained his retirement through coercion, misinformation, or deception. See *Wills v. Department of the Navy*, 37 M.S.P.R. 137, 140 (1988). In determining whether a retirement has been obtained through coercion, misinformation, or deception, the Board has held that an employee's prospect of choosing between inherently unpleasant alternatives does not render the decision to retire involuntary. *Id.*

In the present case, the appellant conceded that he had the alternative of not submitting his resignation in light of the agency's failure to honor its obligations under the agreement. Instead, he chose to tender his resignation and attempt to seek recourse, rather than not fulfill his obligations under the agreement.* Appeal File, Tab 4. Thus, the appellant's prospect of choosing between unpleasant

* The agreement also provided the appellant with the opportunity to pursue the agency's alleged breach through the negotiated procedure. The appellant informed the union about this matter, but it concluded that there was no evidence that the agency breached the settlement. Appeal File, Tab 1. The appellant's dissatisfaction with the union's actions is not a matter within the Board's purview. See *Berry v. Department of Justice*, 31 M.S.P.R. 676, 678 (1986) (Board lacks jurisdiction over allegation that union breached duty of fair representation).

alternatives does not render his resignation voluntary. Cf. *Nies v. United States Postal Service*, 32 M.S.P.R. 510, 512 (1987) (demotion deemed voluntary because appellant did not establish that circumstances permitted him no alternative to demotion).

In reaching this conclusion, we note that the Board has previously found resignations involuntary where the agency did not honor the terms of the settlement reached with the resigning employee. In *Carter v. Department of the Navy*, 6 M.S.P.R. 95 (1981), the appellant resigned in reliance on an agreement with the agency that the resignation would be without prejudice and with a clean record. Following the appellant's resignation, the agency issued a form SF 50, that contained a notation that the appellant resigned after receiving written notice of proposed removal. *Id.* at 96. The Board found that the agency's failure to honor its side of the agreement rendered the appellant's resignation involuntary. *Id.* at 97. See also *Gleaves v. Department of the Navy*, 36 M.S.P.R. 558 (1988) (allegation that agency failed to honor agreement under circumstances similar to *Carter* constituted nonfrivolous allegation of involuntariness of resignation). The present case, however, is distinguishable from these cases because the agreement in question here evolved from the appellant's election to grieve his action through the negotiated procedure, and because the appellant knew of the agency's alleged breach of the agreement before he tendered his resignation. Appeal File, Tab 4. We, therefore, conclude

that the appellant has neither established that his resignation was involuntary, nor proffered a nonfrivolous allegation of involuntariness that would entitle him to a hearing on this matter. See *Gleaves* at 560-61.

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board